* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ Crl. Rev. Pet. No. 466 of 2005

Reserved on : July 27, 2007
Date of Decision : July 30, 2007

DR. G.S. CHANDRAKER ….. PETITIONER
Through Mr. Y.R. Malhotra, Advocate
Vs.

STATE AND ANOTHER ..... RESPONDENTS
Through Mr. Sanjeev Narula with Ms. Sangeeta Sondhi, Advocates

CORAM:
Mr.Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

Mr. Justice S. Ravindra Bhat:

1. This is a criminal revision, preferred against an order dated 07.04.2005. of the Metropolitan Magistrate, (hereafter "the Trial Court") discharging the accused, second respondent.

2. The necessary facts to decide this case are that the petitioner, and the father of the deceased (minor Akash, hereafter called "Akash") was Chief Medical Officer at Pahar Ganj, D.B. Gupta Road, MCD Dispensary. Akash, aged about 14 years, was suffering

from an acute form of Bronchial Asthma since his childhood. He was a regular patient of O.P.D. of Kalawati Saran Children's Hospital (hereafter "KSC Hospital") since 1990. On the fateful day of 30.03.99, he suffered an acute incident of Bronchial Asthmatic attack. Resultantly, he developed breathing problems and was rushed to the O.P.D./ Casualty section of the KSC Hospital by his parents; they were accompanied by their neighbour.

3. It was alleged that when Akash was rushed to the hospital, the doctor on duty, respondent No.2 Dr. Reema S. Nagpal, did not attend him and provide him immediate medical treatment or first-aid. This omission her part, it was alleged, cost Akash his life. An FIR was lodged on 2-8-1999. A final report recommending closure of the case, on the basis of the police investigation, and opinion that no case for criminal negligence had been made out, was filed in court on 19-6-2000. Earlier, during course of investigation, the DCP had sought opinion from the Director General of Health Services, Central Government, on 13-9-1999. The matter was taken up with the Smt. Sucheta Kripalani Hospital and Lady Hardinge Medical Hospital; a committee was constituted. The Committee apparently submitted its report. The report, authored by three doctors, concluded that there appeared to be no evidence of misbehaviour or use of harsh words by the accused doctor. It also concluded that Akash was brought to the casualty of KSC Hospital in a very critical condition. Dr. Nagpal, the accused, had the option of resustication in the casualty or to refer the case to the main casualty of Smt. SSK Hospital, an associated hospital. She opted to refer the case to the SSK hospital as proper resustication equipment was unavailable for that particular patient. This option was not

refuted by the HOD Paediatrics and Senior Paediatrician, KSC Hospital. Dr. Chandraker, father of Akash, filed a complaint. In the meanwhile, the accused doctor had approached this court, seeking quashing of criminal proceedigs; the court was of opinion that she should apply for recall of summoning order, in view of the ratio in *K.M. Mathew -vs- State of Kerala* 1992 (1) SCC 217. She did so; the trial court, after considering all the materials, including the oral testimony of the complainant and his witnesses, issued the impugned order.

4. Learned counsel for the petitioner urged that notwithstanding that respondent no.2 Dr. Reema S. Nagpal, was informed by the father of Akash that he was a regular patient of the hospital for the past eight years and that whenever such an emergency situation arose, his son was given OXYGEN and Injection of Hydrocortisone and Aminophyline and Salbutamol by Nebuliser and that the instrument for resuscitation could be brought from Lady Hardinge Medical College or associated Sucheta Kriplani Hospital , she blatantly disregarded and overruled the suggestions. He urged that she refused to provide even primary medical treatment, which eventually resulted in Akash's death. It was also contended that on seeing the grossly negligent and callous attitude of the Respondent no.2 and the deteriorating condition of his dying son, the petitioner had to remove his son with his own hands and take him in that condition to Sucheta Kriplani Hospital, where he was declared brought dead by doctors on duty.

5. Learned counsel for the petitioner urged that such an attitude of gross negligence and act of omission is a blatant violation of the directions issued by the Hon'ble Supreme Court of India in *Paschim Bangla Khet Mazdoor Samiti & Ors Vs. The State of West*

Bengal AIR 1996 SC 2426, where it was held that failure of a Government hospital in providing primary emergency treatment results in violation of the right to life guaranteed under Article 21 of the Constitution of India.

6. Learned counsel for the petitioner further argued that in the Enquiry Report dated 16.09.99 it was observed that respondent no.2 had referred the case to Sucheta Kriplani Hospital as proper instruments for resuscitation were unavailable for the patient. The learned counsel, however, emphatically pointed to the latter part of the report which categorically stated that since the patient was in an extremely critical condition, possible resuscitation measures should have been initiated before referring the case to Sucheta Kriplani Hospital. He relied on the decision in *Jacob Mathew v. State of Punjab*, 2005 (6) SCC 1, to contend that the behaviour and inaction of the respondent amounted to gross negligence, warranting continuation of proceedings under Section 304-A, IPC.

7. Learned counsel for the respondent no. 2, argued that on the fateful day, she was the doctor on duty. Finding Akash's to be an emergency case, she examined him at once. After examination of the patient, she found that he was breathing, his heart was working. However, the instrument required for resuscitation was unavailable. On enquiring, she found the age of child to be above 14 years. Therefore, considering it dangerous she in the interest of the child, declined to treat him and referred the case to Sucheta Kriplani Hospital on the basis of her expertise and while exercising professional due care. The learned counsel for the respondent cited the judgment in *Suresh Gupta V Government of NCT of Delhi,* wherein it was held, that if the degree of negligence is so gross and the act of the doctor was so reckless as to endanger the life patient , the doctor would be

criminally liable, in addition to any civil liability in tort – for every mishap or death during medical treatment. Counsel submitted that this formulation was approved and applied in *Jacob Mathew 's case* (supra).

8. The trial court carefully considered all the materials on record, including the testimony of the father, whose anguish at the loss of his son cannot be faulted. It concluded that the testimony of the complainant indicated that when the patient was taken to emergency, he was attended to by the accused, who checked him. The proper instruments (i.e adult sized endotrachaeal tubes and laryngoscope) were not available. The court observed that on this, the accused advised the complainant to shift the child to the casualty of SSK Hospital, which were in the same premises. According to her, experimenting with other resuscitative methods would have resulted in delay in effective treatment. The court took into account the opinion of the Medical Board, and then concluded that no case of medical negligence had been made out.

9. The law on professional negligence is but a part of the larger law on negligence. The duty of care, required of a physician or surgeon, or one possessing special skills, was spelt out in by McNair, J in *Bolam v Friern Hospital Management Committee* [1957] WLR 582, (popularly known as *"Bolam's test"*) in the following terms:

> *"I must tell you what in law we mean by "negligence". In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham*

> *omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not posses the highest expert skill; it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Mr Fox-Andrews put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent*

Our Supreme Court approved the above test, in *Suresh Gupta* and, later in *Jacob Mathew*. The court also declared the test to be applied in cases of criminal negligence where a doctor is indicted of having committed an offence, in the following terms (in *Jacob Mathew*):

> *"(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G. P. Singh) referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three : "duty", "breach" and Resulting damage".*
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> *(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error or judgment or an accident, is not proof of negligence on the part of a medical professional.*

So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it cames to the failure of taking precautions, what has to be seen is whether those precautions, were taken which the ordinary experience of men has found to be sufficient : a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard of judging the alleged negligence. So also, the stand of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skill in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment or negligence.

(4) The test for determining medical negligence as laid down in Bolam case (1957) 1 WLR 582 hold good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence; the degree of negligence should be much higher i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A, IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or

negligent act" as occurring in Section 304-A, IPC has to be read as qualified by the word "grossly".

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res Ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence".

The above, particularly (7) suggest that the threshold of behaviour which would amount to criminal negligence is not mere inaction or omission, or some error of judgment, but something greater. The doctor who may be held liable in tort, or under consumer law, may yet not be charged for criminal negligence, on account of this higher standard of culpability insisted upon by the decision.

10. I have carefully considered all the materials on record. The trial court records, which include the final report and the opinion of the Board, are part of the original records. Though the opinion of the Board has given a clean chit to the accused, it has added, almost as a postscript -perhaps, I suspect, as a palliative that " we feel that the patient being in a very critical condition, possible resuscitative measures should have been initiated while referring the case to main casualty of Smt. SK Hospital". The opinion, stating that the accused was not at fault, has not been challenged through another expert opinion.

11. A distraught father's anguish on witnessing his son's life ebbing away can only be empathized. The complainant's agony is understandable. There is no doubt that the hospital in question was woefully lacking in equipment. It is no consolation for a person who has lost his loved one to be told, at the eleventh hour that medical help is available round the corner, but not where he seeks it. Yet, inadequacies in the system should not obscure the task of the court, which is to see whether the accused's conduct, as shown by the materials on record, may lead to grave suspicion of her being guilty of criminal negligence.

12. A judge, unschooled and unskilled in the art of medicine, in a case like the present has to consider the probabilities. Ultimately, the test applicable is that the behaviour complained should be one no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. After considering all the facts and attendant circumstances, I am of the opinion that the accused's conduct cannot lead to grave suspicion of her having committed offence under Section 304-A IPC. The impugned judgment of the trial court is therefore affirmed. In the circumstances, the petition has to fail; it is dismissed without order as to costs.

(S. RAVINDRA BHAT)
JUDGE

July 30, 2007